Supreme Court, U.S.
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No. 86-1120

# In the Supreme Court of the United States

OCTOBER TERM, 1986

UBALDO DiBENEDETTO,
PETITIONER,

*v.*

COMMONWEALTH OF MASSACHUSETTS
and
JAMES RYAN,
RESPONDENTS.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

May liability be imposed in an action under the Age Discrimination in Employment Act, 29 U.S.C. §§621-634, where a jury found specifically that the failure to hire the plaintiff was neither because of his age nor because of a supervisory employee's discriminatory motives or actions?

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### Opinions Below

The opinion of the trial judge in the Massachusetts Superior Court, entitled "Order for Judgment," is unreported; it is reproduced at pp. 1-13 of the Supplemental Appendix (hereinafter "Supp. App.") to the Petition. The opinion of the Supreme Judicial Court of Massachusetts is reported at 398 Mass. 395, ____ N.E.2d ____ (1986), and is reproduced at pp. 37-55 of the Petition. The Order of the Supreme Judicial Court of October 3, 1986, denying rehearing, is unreported.

## Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

## Statute Involved

The pertinent provisions of the Age Discrimination in Employment Act, 29 U.S.C. §§623(a), 630(b) and 631(a), are set forth at p. 56 of the Petition.

## Statement of the Case

The petitioner, plaintiff below, claims that the respondents violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§623-634, when they failed to hire him for a faculty teaching position at the University of Massachusetts at Boston. The respondents are the Commonwealth of Massachusetts, which operates the University, and James Ryan, who was the chairman of the Spanish department at the University's Boston campus. The plaintiff had applied in 1979 for an advertised faculty position in the Spanish department for a teacher with "special training or experience in Applied Linguistics and to serve as coordinator of first and second year courses in Spanish." In several conversations, respondent Ryan had told petitioner, who was 51 years old, that the department was "looking for some younger people"; nonetheless, Ryan asked petitioner to submit his curriculum vitae and other information, and petitioner and five other candidates were interviewed by the department's personnel committee, which was to recommend a candidate for the position to the University administration. Ryan, as department chairman, was an ex officio member of the personnel committee but had no vote. The committee voted to recommend that the position be offered to another candidate, Esther Torrego, then 33 years old. Members of the committee testified that the ages of the applicants played no part in the selection process. Ryan forwarded the committee's recommendation, with his approval, to the dean, who offered the position to Torrego. (Petition at 37-40.)

Petitioner filed suit in the state court in 1980 alleging that in failing to hire him the respondents had discriminated against him on account of his age, in violation of the ADEA; the respondents denied that the failure to hire the petitioner was based on his age. (Petition at 40.) The case was tried twice before a jury, the first trial ending in a mistrial when the jury could not agree on a verdict. (Supp. App. at 1.) The second trial was held before the same judge, and by tacit agreement of the parties the same "ground rules" were applied, including the form of the special questions submitted to the jury. (Supp. App. at 1, 12.[1]) Those questions, which were submitted on the basis of instructions drawn from the language of an opinion of the First Circuit in an ADEA case (Petion at 41-42; Supp. App. at 2) were answered by the jury as follows:

1) Did the Commonwealth fail or refuse to hire the plaintiff because of his age? "No."
2) Did the defendant James Ryan discriminate against the plaintiff because of his age? "Yes."
3) Did the Commonwealth fail or refuse to hire the plaintiff because of the defendant James Ryan's discrimination? "No."
4) Was any discrimination done in willful violation of the law? "Yes."[2]

(Petition at 45-46, fn. 4.) Based on the jury's answers the trial judge concluded that there was no causal relationship between the "discrimination" on Ryan's part and the failure to hire the plaintiff. Accordingly, he entered judgment dismissing petitioner's complaint. (Supp. App. at 7-8; Petition at 47.) The sole

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[1] Petitioner made no formal "objection" to question number 3, although his counsel argued against its submission to the jury during lobby conferences at the first trial. (Supp. App. at 1, 7, 12.) No objection of any sort was made at the second trial, and petitioner has made no showing why the question, which tracks the causation language of 29 U.S.C. § 623(a)(1), was improper.

[2] Question 5 dealt with petitioner's unlawful recording of telephone conversations with Ryan.

question presented on appeal was whether the entry of that judgment was correct. (Petition at 47.) The Supreme Judicial Court held that it was, and affirmed the Superior Court. (Petition at 47-48, 55.)

## Reasons for Denying the Writ

### I. The Case Presents No Split of Authority Requiring Resolution by This Court.

Despite petitioner's assertions to the contrary, the decision of the Supreme Judicial Court neither departs from the holdings of the Federal Circuit Courts nor promulgates any novel interpretation of the ADEA. The case involves nothing more than the application of well-established principles, grounded in the language of the statute itself, to the particular facts of the situation. Both the trial judge (see Supp. App. at 2; Petition at 41-42) and the Supreme Judicial Court (Petition at 41-42, 44) expressly stated that they were following the holding and the language of the First Circuit in *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), concerning the requirement that a plaintiff under the ADEA show that age was a "determinative factor" in, *i.e.*, that it had a causal relationship to, the decision not to hire him. The Supreme Judicial Court cited cases from several other circuits, all to the same effect. (Petition at 42, 44, 51.) Since no contrary line of authority has been cited by the petitioner, his argument amounts at most to an assertion that the Supreme Judicial Court misapplied the causation requirement set forth in the statute and explicated in *Loeb* and the other cases. But even that position cannot stand, because the decision was clearly correct.

## II. The Decision of the Supreme Judicial Court Was Correct.

The Supreme Judicial Court recognized, as had the trial judge, that the jury's verdict foreclosed the imposition of liability on either defendant. The jury found in answers to two separate questions that the failure to hire the plaintiff was *not* because of his age. (Petition at 54, 55; Supp. App. at 7-8.) Thus, the statute, 29 U.S.C. § 623(a)(1), was not violated. The petitioner's tortuous argument based on Ryan's status as an "employer" and his having been found to have "discriminated" against petitioner confused, as the state court recognized, "the definition of employer with the ultimate issue of causation." (Petition at 50.) The Petitioner's real problem is not with the court's application of the law but with the jury's findings on the facts.

## Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submited,

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February, 1987